Supreme Court, U.S.
FILED

No. 99 1 1 3 JUL 1 5 1999

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

VILLAGE OF NORTHFIELD,
Petitioner,

v.

10280 NORTHFIELD ROAD, LLC,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JOSEPH W. DIEMERT, JR., ESQ.
(Counsel of Record)

DIRECTOR OF LAW,
VILAGE OF NORTHFIELD
JOSEPH W. DIEMERT, JR. &
ASSOCIATES CO., L.P.A.
1360 S.O.M. CENTER ROAD
CLEVELAND, OH 44124
(440) 442-6800

Attorney for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC., CINCINNATI, OHIO 800-890-5001

QUESTION PRESENTED

Whether a federal court has the ability to sever a local ordinance by applying state law on severance, without such actions being considered a rewriting of a statute in conflict with federal law?

PARTIES TO PROCEEDING

PETITIONERS

The Village of Northfield, Ohio is a chartered municipal corporation, pursuant to the Ohio Constitution, Article XVIII, Section 7.

RESPONDENTS

10280 Northfield Road, LLC is an Ohio Limited Liability Company and the lessee of the premises located at 10280 Northfield Road.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 9

ARGUMENT FOR GRANTING WRIT 11

ARGUMENT 13

I. THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE WELL-FOUNDED PRINCIPLE THAT A COURT SHOULD MAINTAIN AN ACT IN SO FAR AS IT IS VALID AND THAT ISSUES OF SEVERABILITY ARE A QUESTION OF STATE LAW. 13

II. WHEN IT IS CLEAR THAT THE SUBSTANTIVE REGULATORY PROVISIONS OF A LOCAL ORDINANCE MAY BE APPLIED SEPARATE AND

APART FROM THE ENFORCEMENT PROVISIONS HELD UNCONSTITUTIONAL A LOCAL ORDINANCE MAY BE SEVERED BY A FEDERAL COURT, THROUGH APPLICATION OF A STATE'S LAW ON SEVERANCE, WITHOUT THE JUDICIARY USURPING LEGISLATIVE FUNCTIONS. . . . 18

CONCLUSION 25

APPENDIX

Appendix A
Sixth Circuit Opinion, 3/4/99 . . . . . 1a

Appendix B
Sixth Circuit Order Granting Petitioner's Motion to Stay the Mandate, 5/17/99. . . . . 13a

Appendix C
District Court Memorandum Opinion, including Findings of Fact and Conclusion of Law, 9/26/97. . . . . 15a

Appendix D
Sixth Circuit Order Denying Petitioner's Request for Rehearing and Suggestion for Rehearing *En Banc*, 5/5/99. . . . . 48a

TABLE OF AUTHORITIES

CASES

Alaska Airlines, Inc. v. Brock,
480 U.S. 678 (1987) 12, 13, 25

Bardo v. City of Lyndhurst,
37 Ohio St.3d 106, 524 N.E.2d 447 (1988) 19

Bednar v. North Canton,
69 Ohio St.3d 278, 631 N.E.2d 621 (1994) 19

City of Lakewood v. Plain Dealer Pub. Co.,
486 U.S. 750 (1988) 12, 14, 15, 18, 25

City of Renton v. Playtime Theaters, Inc.,
475 U.S. 41 (1986) 19

Eubanks v. Wilkinson,
937 F.2d 1118, 1122 (Sixth Cir. 1991) 11, 25

Geiger v. Geiger,
117 Ohio St. 451,
160 N.E.2d 28 (Ohio 1927) 12, 17, 24

Hill v. Wallace,
259 U.S. 55, 71 (1922) 13

Immigration & Naturalization Service. v. Chadha,
462 U.S. 919 (1983) 11, 12, 24

Leavitt v. Jane L.,
518 U.S. 137 (1996) 11, 18, 25

State ex rel. Maurer v. Sheward,
71 Ohio St.3d 513,
644 N.E.2d 69 (Ohio 1994) 12, 24

State v. Hochhausler,
668 N.E.2d 457 (Ohio 1996) 12

United States v. Reese,
92 U.S. 214, 221 (1875) 14, 25

United States v. Thirty-Seven Photographs,
402 U.S. 363 16

Young v. American Mini-Theaters, Inc.,
427 U.S. 50 (1976) 19

STATUTES

28 U.S.C. §1254(1) and §2106. 1

28 U.S.C. 1343(A)(3) 10, 14, 18

28 U.S.C. 1331 10

28 U.S.C. 1367(A) 10

28 U.S.C. 2201 10

Ohio Constitution, Article XVIII, Section 7 . . . . . ii, 1

Ohio Constitution, Article XVIII, Section 3 2

Ohio Revised Code at Section 1.50 18

Village of Northfield Codified Ordinances,
Chapter 802 . . . . . *passim*

Village of Northfield Codified Ordinances,
Chapter 802, Section 802.01 . . . . . *passim*

Village of Northfield Codified Ordinances,
Chapter 802, Section 802.02 . . . . . 2, 10, 15

Village of Northfield Codified Ordinances,
Chapter 802, Section 802.03 . . . . . *passim*

Village of Northfield Codified Ordinances,
Chapter 802, Section 802.04 . . . . . *passim*

Village of Northfield Codified Ordinances,
Chapter 802, Section 802.05 . . . . . *passim*

Village of Northfield Codified Ordinances,
Chapter 802, Section 802.99 . . . . . *passim*

Village of Northfield Codified Ordinances,
Chapter 802, Section 202.08 . . . . . 19, 20, 21

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is not reported. A copy of the Opinion is included in Appendix A at 1a through 12a. The Opinion of the District Court for the Northern District of Ohio, Eastern Division, is not reported. A copy of the Opinion is included in Appendix B at 15a through 47a.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its Opinion on March 4, 1999. On March 18, 1999, Petitioner filed a Petition for Rehearing and Suggestion for Rehearing *En Banc*, which the United States Court of Appeals denied on May 5, 1999. A copy of the Order is included in Appendix D at 48a through 49a. On May 12, 1999, Petitioner filed a Stay of Mandate Pending Petition for Writ of Certiorari. The Mandate was granted on May 17, 1999 for sixty days. This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing and within 60 days from the granting of Petitioner's Motion to Stay the Mandate. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1) and §2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Ohio Constitution Article XVIII, Section 7.

Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of Section 3 of this Article, exercise thereunder all powers of local self-government.

Ohio Constitution Article XVIII, Section 3.

Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary, and other similar regulations, as are not in conflict with general law.

Northfield Village Chapter 802.[1]

CHAPTER 802
ADULT ENTERTAINMENT BUSINESSES

802.01 Purpose
802.02 Definitions
802.03 Conditional Use Permit
802.04 Permit Guidelines
802.05 Notice Requirements
802.99 Penalty

802.01 PURPOSE

The purpose of this Chapter is to promote the public health, safety, and welfare through the regulation of adult entertainment businesses. It is the intent of these sections to regulate entertainment businesses, as defined herein, so as to prevent crime, protect the Municipality's retail trade and property values, and in general, preserve the quality of life in the Municipality, while at the same time not suppressing First Amendment rights.

802.02 DEFINITIONS

(a) An "adult entertainment business" means an adult bookstore, adult motion picture theater, or an adult-only entertainment establishment as

---

[1] Sections 802.04 and 802.05 were held unconstitutional by the District Court.

further defined in this section.

(b) An "adult bookstore" means an establishment which utilizes twenty-five percent (25%) or more of its retail selling area for the purpose of retail sale, rental, or display, by coin, slug-operated, electronically, electrically or mechanically controlled still or motion picture machines, projectors, or other image-producing devices, of books, magazines, other periodicals, films, tapes, or cassettes, which are distinguished by their emphasis on adult materials as defined in this section.

(c) An "adult motion picture theater" means a motion picture theater which is regularly used or utilizes twenty-five percent (25%) or more it its total viewing time for presenting material distinguished or characterized by an emphasis on matter depicting, describing, or related to adult material as defined in this section.

(d) An "adult only entertainment establishment" means an establishment where the patron directly or indirectly is charged a fee and where the establishment features entertainment or services which constitute adult material as defined in this section, or which features exhibitions, dance routines, or gyrational choreography of persons totally nude, topless, or bottomless, or strippers, male or female impersonators, or similar entertainment or services which constitute adult material.

(e) "Adult material" means any book, magazine, newspaper, pamphlet, poster, print, picture, slide, transparency, figure, image, description, motion picture, film, videotape, photographic record, tape, or other tangible thing or service, capable of arousing interest through sight, sound, or touch, and;

(1) Which material is distinguished or characterized by an emphasis on matter displaying, describing, or representing sexual activity, masturbation, sexual excitement, nudity, bestiality, or human bodily functions or elimination; or

(2) Which service is distinguished or characterized by an emphasis on sexual activity, masturbation, sexual excitement, nudity, bestiality, or human bodily functions of elimination.

(f) "Bottomless" means less than full opaque covering of male or female genitals, pubic area or buttocks.

(g) "Nude or nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks, with less than full, opaque covering of any portion thereof, or female breast(s) with less than full, opaque covering of any portion thereof below the top of the nipple, or of covered male

genitals in a discernible turgid state.

(h) "Topless" means the showing of a female breast with less than full opaque covering of any portion thereof below the top of the nipple.

(i) "Sexual activity" means sexual contact or sexual conduct, or both.

(j) "Sexual contact" means any touching of an erogenous zone of another including, without limitation, the thigh, genitals, buttocks, pubic region, or, if the person is female, the breast, for the purpose of sexually arousing or gratifying either person.

(k) "Sexual excitement" means the condition of the human male or female genitals, when in a state of sexual stimulation or arousal.

802.03 CONDITIONAL USE PERMIT[2]

No person shall cause or permit the establishment (defined as the opening of a new business, relocation of an existing business, or the conversion of an existing business) of an adult entertainment business unless authorized by the issuance of an adult entertainment conditional use permit **in accordance with Section 804.04. In addition,** an adult entertainment business shall comply with the following conditional use criteria:

---

2. The words highlighted in bold lettering were those removed by the District Court. Those words italicized were inserted by the District Court.

(a) Adult entertainment businesses shall be conditionally permitted only in a B-2 designated district and shall comply with all regulations within such district.

(b) No adult entertainment business shall be located within 500 feet of any residential district or residential property line, church, park, preschool, or school.

(c) No adult entertainment business shall be permitted in a location which is within 1000 feet of another adult entertainment business.

(d) No adult entertainment business shall be permitted within 500 feet of any boundary of any residential district which is within an abutting local unit of government (city, village, township).

A conditional use permit shall be issued promptly by the Planning Commission within a reasonable amount of time after the submission of a permit application which reflects compliance with the four location requirements.

802.04 PERMIT GUIDELINES

An adult entertainment establishment shall be issued a conditional use permit if the establishment of the business is in accordance with Section 802.03 and the following.

(a) That the proposed use will not be contrary to the pubic interest or injurious to nearby properties, and that the spirit and intent of this

Business Regulation Code will be observed.

(b) That the proposed use will not enlarge or encourage the development of a skid row area.

(c) That the establishment of an additional regulated use in the area will not be contrary to any program of neighborhood conversation or will it interfere with any program of urban renewal.

(d) That all applicable regulations of the Business Regulation Code and Building and Zoning Codes will be observed.

802.05 NOTICE REQUIREMENTS

(a) In addition, prior to granting such a conditional use permit, the Planning Commission shall give due notice of the receipt of any application under consideration (notice of application) to all persons to whom any real property within 1,000 feet of the premises in question is assessed, and to the occupants of all single, two, three, and four family buildings (for buildings with over four families, a notice may be posted in an appropriate location within the multi-unit building), and to all other places within 1,000 feet of the premises. Such notice shall be delivered personally or by mail address to the respective owners. If the tenant's name is not known, "occupant" may be used.

(b) The notice of application shall inform the

recipient of the applicant's name, the applicant's proposal, and local address and the section of the Codified Ordinances under which the proposal is being processed. Such notice shall also invite the expression of comments, statements, or opinions either in writing or in person, with a time period expiring not less than fourteen days from the mailing date of such notice.

(c) Subsequent to the deadline for response to the notice of application, a decision shall be made by the Commission (taking into consideration the comments, statements and opinions expressed) to either approve, approve with conditions, or deny the proposal in accordance with the standards set forth in this Chapter. The Commission's decision shall be subject to review by Council, which may approve, disapprove, or modify the Commission's decision.

(d) In approving a permit for any regulated use, the Commission or Council may impose any such conditions or limitations upon the establishment, location, construction, maintenance, or operation of the regulated use as it may, in its judgment, be necessary for the protection of the public interest.

802.99 PENALTY

Whoever violates any of the provisions of this chapter shall be guilty of a misdemeanor of the fourth degree and shall be fined not more than two hundred fifty dollars

($250.00) or imprisoned not more than thirty days, or both, for each offense. A separate offense shall be deemed committed each day during or on which a violation occurs or continues as to each such device.

STATEMENT OF THE CASE

Petitioner, the Village of Northfield, is a chartered municipality located in Summit County, Ohio. The Village has a total population of approximately 3,600 residents, and a land mass of approximately one square mile. The current charter contains supremacy language which allows the Village to adopt rules, including zoning laws, that supercede state statutes on the same subject. The Respondent, 10280 Northfield Road, LLC, is an Ohio Limited Liability Company, and the lessee of the premises located at 10280 Northfield Road.

The Respondent sought to open an adult entertainment business within the Village. The establishment and running of such businesses is regulated by Chapter 802 of the Village's Codified Ordinances. Chapter 802 was designed to regulate the secondary effects of adult entertainment businesses, mainly through the issuance of conditional use permits and location restrictions held constitutional by this Court. Such establishments are restricted to B-2 zoned business districts, and may not be located within 500 feet of a residential district, church, park, or school, or within 1000 feet of another adult entertainment business.

Respondent's business is located within a B-2 zoned business district, but is within 500 feet of a residence and a residentially zoned district. The parties have stipulated that the premises, located at 10280 Northfield Road, is within 40 feet of a residential district and a residential property line.

On April 28, 1997, Respondent filed a civil action challenging the validity of Chapter 802 on the basis that: (1) it was facially an unconstitutional system of prior restraint; (2) it was a content-based regulation, not narrowly drawn, and left open inadequate channels of communication; and (3) it was a *de facto* zoning ordinance which was adopted contrary to the mandatory state statutory requirements for the adoption of zoning ordinances. Simultaneously, Respondent filed a Motion for Preliminary Injunction seeking to restrain the Village from enforcing Chapter 802 during the pendency of the action. The Preliminary Injunction hearing and the Trial were consolidated and heard at a bench trial, before the District Court, on July 3, 1997.

The District Court had jurisdiction over the original action pursuant to 28 U.S.C. 1331 (Federal Question), 28 U.S.C. 1343(A)(3) (Civil Rights), 28 U.S.C. 2201 (Declaratory Judgments), and 28 U.S.C. 1367(A) (Supplemental Jurisdiction). On September 26, 1997, the District Court issued its Memorandum Opinion, Including Findings of Fact and Conclusion of Law, located in Appendix C at 15a. The District Court upheld Chapter 802, including Sections 802.01, 802.02, 802.03, and 802.99 as constitutional, but struck down Sections 802.04 and 802.05 as unconstitutional. The District Court reached its decision by applying Ohio's law on severance. The law provides a court the authority to sever unconstitutional portions of a codified ordinance, leaving intact other sections which can be given effect independently of the invalid provisions.

Respondent filed a timely appeal with the Court of Appeals for the Sixth Circuit. On March 4, 1999, the Court of Appeals reversed the District Court, and in so doing, ignored the application of Ohio's law on severance and precedent set forth by this Court. The Panel rejected the

District Court's decision stating that, "The District Court impermissibly rewrote the Village's ordinance. *See, e.g. Eubanks v. Wilkinson,* 937 F.2d 1118, 1122 (Sixth Cir. 1991) (holding that "Courts construe statues to avoid constitutional difficulty when 'fairly possible'," but "the general federal rule is that courts do not rewrite statutes to create constitutionality" and "a federal court 'has very limited powers in construing state statutes or municipal ordinances'"). Appendix A at 10a.

Petitioner's Request for Rehearing and Suggestion for Rehearing *En Banc* was denied on May 17, 1999.

ARGUMENT FOR GRANTING WRIT

The Village of Northfield's Adult Bookstore Business Regulation was drafted with the intent to regulate the secondary effects of adult entertainment businesses. In reviewing the constitutionality of the local ordinance, the lower courts engaged in a dispute over its severability. The District Court, in severing the ordinance, struck down §802.04 and §802.05 as unconstitutional, but held that the remaining sections deemed constitutional, were valid, and enforceable. However, the Sixth Circuit Court of Appeals found that the District Court engaged in the business of "rewriting" a local ordinance in conflict with *Eubanks v. Wilkinson*, 937 F.2d 1118 (Sixth Cir. 1991).

The Sixth Circuit Court of Appeals, in its unpublished decision, placed primary reliance upon *Eubanks v. Wilkinson* in deciding an important federal question, the constitutionality of a local ordinance. In addition, the Court of Appeals' decision conflicts in principle and undermines the precedential value of the United States Supreme Court cases of *Leavitt v. Jane L.*, 418 U.S. 137 (1996); *Immigration & Naturalization*

Service. v. Chadha, 462 U.S. 919 (1993); *City of Lakewood v. Plain Dealer Pub. Co.,* 486 U.S. 750 (1988); and *Alaska Airlines, Inc. v. Brock,* 480 U.S. 678 (1987). Further, in rendering the subject decision, the Sixth Circuit Court of Appeals decided an important federal question in a way that conflicts with cases of the Ohio Supreme Court, specifically, *State v. Hochhausler*, 668 N.E.2d 457 (Ohio 1996); *State ex rel. Maurer v. Sheward*, 644 N.E.2d 369 (Ohio 1994); and *Geiger v. Geiger*, 160 N.E.2d 28 (Ohio 1927).

Therefore, the need for judicial guidance from this Court is paramount. The issue at hand is one most sacred, the right to life, liberty, and property, through due process of law. The Village of Northfield has an obligation to afford its citizens due process of law, to protect their general welfare, health, and safety and to legislate for the benefit of its citizens by regulating the secondary effects of adult entertainment businesses. The Sixth Circuit has sought to disrupt Ohio and United States Supreme Court precedent by striking down as unconstitutional, on technical grounds, a constitutional ordinance.

The issue addressed herein, the ability of a federal court to sever a local ordinance, without impermissibly rewriting a statute is one of first impression for this Court and of exceptional national importance in application.

ARGUMENT

I. THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE WELL-FOUNDED PRINCIPLE THAT A COURT SHOULD MAINTAIN AN ACT IN SO FAR AS IT IS VALID AND THAT ISSUES OF SEVERABILITY ARE A QUESTION OF STATE LAW.

In *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987), this Court set forth the following guidelines for federal courts to follow when considering the severance of a statute. Generally, a court should, "Maintain an act in so far as it is valid." *Id.* at 684. In the event that a federal court is considering the severance of a statute, those valid sections should be maintained unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not. *Id.*

The invalid part may be dropped, if what is left is fully operative as a law. *Id.* As a final suggestion, this Court stated that a relevant inquiry should be, "Whether the statute will function in a manner consistent with the intent of Congress." *Id.* at 685.

In *Hill v. Wallace*, 259 U.S. 55, 71 (1922), this Court acknowledged that the severability provisions in a statute under review, "Furnish assurance to courts that they [could] properly sustain separate sections or provisions of a partly invalid act without hesitation." However, such a severability provision does not allow, "The court to dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain." *Id.* at 70. This is legislative work beyond the power and function of the court. *Id.*

Therefore, maintaining an act insofar as it is valid does not violate a court's general prohibition on rewriting statutes. A federal court has the ability to carve a statute, separating the unconstitutional sections from those held constitutional, but not the ability to usurp legislative functions, by taking an unconstitutional section and reframing it by inserting words of limitation.

In the case at hand, the Court of Appeals for the Sixth Circuit incorrectly identified the valid severance of the ordinance to be a rewriting of the ordinance. Of the six sections within Chapter 802, Sections 802.04 and 802.05 were found unconstitutional. Those remaining were not saved from being ruled unconstitutional through dissection or reframing. Such opinion has resulted in a decision in conflict with precedent set forth by the Ohio and United States Supreme Courts, because the Panel failed to maintain those sections of Chapter 802 found constitutional by the District Court.

The general distinction between maintaining an act insofar as it is valid, and rewriting an act, is with the addition of "words of limitation." Allowing a federal court to include "words of limitation," ". . . would, to some extent, substitute the judicial for the legislative department of the government." *United States v. Reese*, 92 U.S. 214, 221 (1875). When this principle is applied to a municipal or state statute, issues of federalism become an additional concern. *Id.* In such cases, an even stricter prohibition against adding "words of limitation" is created.

This concept was displayed by this Court in *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988). At issue in *Lakewood* was the facial constitutionality of a local ordinance regulating the placement of news racks on public property. This Court, in remanding the issue of severability

to the Sixth Circuit Court of Appeals, held portions of the ordinance, which gave the mayor unfettered discretion to deny permit applications and unbounded authority to condition the permit on any additional terms he deemed, "necessary and reasonable," to be unconstitutional. *Id.* at 772.

Therefore, this Court declined to presume the mayor would, "Adhere to standards absent from the statute's face," and declared that, "The limits the city claims are implicit in its law must be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice," and asserted that, "This Court will not write non-binding limits into a silent state statute." *Id.* at 770. Therefore, once a local ordinance has been declared unconstitutional, it may not be saved by the court imposing its judgment or standards or adding words of limitation.

The main provision in dispute between the lower courts is Section 802.03, in which seven words were removed and a common sense interpretation was included by the District Court. Sections 802.01. 802.02, and 802.99 were not modified in any fashion. The language included within Section 802.03 is not limiting language and does not equate to the imposition of the court's judgment or standard.

Section 802.03 prohibited opening an adult entertainment business unless location requirements, set forth in the within Section, were met and unless authorized by the issuance of an adult entertainment conditional use permit in accordance with Section 802.04. Since the provisions set forth in Section 802.04 were deemed unconstitutional prior restraints, seven words were struck from Section 802.03, so as not to refer to Section 802.04. Such modifications clearly does not amount to the rewriting of an ordinance, but is in keeping with precedent requiring a court to maintain an act

insofar as it is valid.

The District Court included the following:

> A conditional use permit shall be issued promptly by the Planning Commission within a reasonable amount of time after the submission of a permit application which reflects compliance with the four location requirements.

On previous occasions, this Court has included time limits, so as to establish procedural guidelines based upon legislative history. In *United States v. Thirty-Seven Photographs,* 402 U.S. 363, *reh'g* denied, 403 U.S. 924 (1971), this Court supplied time limits within which a forfeiture proceeding must be instituted for material seized pursuant to federal statute allowing customs officials to seize obscene materials. This Court inserted the limits, based on legislative history which indicated that the forfeiture proceeding should be held immediately following the seizure of materials. *Id.* at 370-373.

As applied to the case at hand, the District Court, in keeping with precedent set forth by this Court, imposed a time limit which naturally could be concluded from the wording of the ordinance, that the permit would issue once compliance with the location requirements had been met. Put another way, the District Court did not rewrite the ordinance, but used a slight "overlay" clarification or detail equal to a common sense

interpretation, imposing a time limit on the issuance of the conditional use permit. As such, Section 802.03 will function in a manner consistent with the Chapter's intent to regulate the

secondary effects of adult entertainment businesses, through location requirements.

It should also be noted that Ohio's law on severance contemplates the insertion of words. The third prong of the *Geiger* test on severability, requires a court to determine whether the insertion of words or terms is necessary in order to separate the constitutional part from the unconstitutional part and to give effect to the former only. *Geiger v. Geiger*, 117 Ohio St. 451, 160 N.E.2d 28 (Ohio 1927). This third prong has been interpreted broadly, to disallow entire subsections of a statute from being rearranged by the court, but allow the inclusion of words to some extent.

If the Court of Appeals decision, in this case, is allowed to stand, there will no longer be a distinction between the ability to sever an ordinance and the prohibition against rewriting an ordinance. Any legislation deemed unconstitutional in part will be ruled unconstitutional in whole, resulting in First Amendment issues being determined on technical grounds. Unfortunately, the Court of Appeals fell down a slippery slope that this Court did not intend. Further, Ohio's law on severance will no longer be applicable in a federal court because of its broad interpretation, which contemplates the insertion of words. Ohio's law on severance may likely be construed as a judicial act usurping legislative powers and no longer valid.

In conclusion, there is a clear distinction between maintaining an act insofar as it is valid, which includes the ability to sever an ordinance, and the rewriting of the same, which imposes a court's judgment and standards, and thereby in effect, usurps fundamental legislative functions. In order to uphold this well founded distinction, and not muddy the waters, the Court of Appeals' decision in this matter should be

struck down as conflicting with Ohio and Supreme Court precedent.

II. WHEN IT IS CLEAR THAT THE SUBSTANTIVE REGULATORY PROVISIONS OF A LOCAL ORDINANCE MAY BE APPLIED SEPARATE AND APART FROM THE ENFORCEMENT PROVISIONS HELD UNCONSTITUTIONAL, A LOCAL ORDINANCE MAY BE SEVERED BY A FEDERAL COURT, THROUGH APPLICATION OF A STATE'S LAW ON SEVERANCE, WITHOUT THE JUDICIARY USURPING LEGISLATIVE FUNCTIONS.

It is clear that the severability of a local ordinance is a question of state law. *Leavitt v. Jane L.*, 518 U.S. 137 (1996) and *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988). Ohio's law on severance is set forth in the Ohio Revised Code at Section 1.50, and states as follows:

> If any provision of a section of the Revised Code or the application thereof to any person or circumstances is held invalid, the invalidity does not effect other provisions or applications of the section or related sections which can be given effect without the invalid provision or application, and to this end, the provisions are severable.

Ohio Revised Code §1.50 sets forth Ohio's law on severance, however because Petitioner is a chartered municipality, its ordinances on severance must be applied first and foremost.

The Village of Northfield, in adopting its own Charter, under the application of the "Home Rule," has the authority

to exercise all powers of self-government. The effect of the distinction between chartered and non-chartered municipalities, provides that specific charter provisions and any residual Home Rule powers not exercised directly in a municipality's charter, apply first and foremost before state statutory provisions. *Bednar v. North Canton*, 69 Ohio St.3d 278, 631 N.E.2d 621 (1994); and *Bardo v. City of Lyndhurst*, 37 Ohio St.3d 106, 524 N.E.2d 447 (1988). Therefore, since Petitioner has adopted Section 202.08 on severability, it must be applied first to the instant case before the more general state statute. Section 202.08 provides:

> If any provision of a section of the Codified Ordinances or the application thereof to any person or circumstances is held invalid, the invalidity does not effect other provisions or applications of the section or related sections which can be given effect without the invalid provision or application, and to this end, the provisions are severable.

The simple and plain meaning application of Section 202.08 to Chapter 802, provides that because Section 802.01 through 802.03 and 802.99 may be given effect without the invalid provisions, they may remain valid, enforceable, and withstand constitutional muster.

The legislative intent and purpose behind Chapter 802 is to regulate the secondary effects of adult entertainment businesses, mainly through the issuance of a conditional use permit and location restrictions held constitutional by this Court in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986) and *Young v. American Mini-Theaters, Inc.*, 427 U.S. 50 (1976). As with most legislation, Chapter 802 was drafted to include both substantive and enforcement provisions. Thereby, separating the substantive provisions

from those provisions deemed enforcement would fit squarely within Section 202.08.

To illustrate, the first section held unconstitutional by the District Court was Section 802.04. Section 802.04 provided for **additional** guidelines and standards governing the issuance of a conditional use permit required to operate an adult entertainment business. Specifically, this Section required adult entertainment businesses to comply with essentially all other applicable Code sections of Northfield Village. In its application, this Section was only to be consulted in the event that the location requirements of 802.03 were established.

Section 802.04 states:

802.04 PERMIT GUIDELINES

An adult entertainment establishment shall be issued a conditional use permit if the establishment of the business is in accordance with Section 802.03 and the following:

(a) The proposed use will not be contrary to the public interest or injurious to nearby properties, the spirit and intent of this Business Regulation, and Taxation Code will be observed.

(b) The proposed use will not enlarge or encourage the development of a skid row area.

(c) The establishment of an additional regulated use in the area will not be contrary to any program of neighborhood conservation, nor interfere with any program of urban renewal.

(d) All applicable provisions of this Business Regulation and Taxation Code, the Building and Housing Code and the Planning and Zoning Code will be observed.

Section 802.03 was drafted with the intent to enforce compliance with essentially all provisions of Petitioner's Codified Ordinances. As a result, this Section neither provides nor describes the essential nature of Chapter 802 or its fundamental intent or purpose. Thus, this provision stands in the nature of an enforcement provision from which a conditional use permit would have been issued, so long as all additional guidelines were followed. Therefore, because Section 802.04 sets forth additional non-fundamental guidelines, it functions secondarily on the level of an enforcement provision.

Thus, upon a plain application of Section 202.08, it is clear that Section 802.04 may be severed from the remaining sections of Chapter 802. Those sections which remained and were found constitutional by the District Court are substantive in nature and outline the purpose and intent of the Chapter, setting forth definitions, location restrictions on conditional use permits, and penalties.

The second section deemed unconstitutional by the District Court was Section 802.05. The specific purpose of this Section established procedures for the notification of all those residing within 1000 feet of a subject property, imposed limitations and other conditions deemed in the public interest, and allowed the granting or denial of a permit based upon all applicable evidence, including statements and opinions expressed. This Section, like Section 802.04, is in the nature of an enforcement provision, overseeing the actual execution of a conditional use permit.

Section 802.05 states as follows:

802.05 NOTICE REQUIREMENTS

(a) In addition, prior to granting such a conditional use permit, the Planning Commission shall give due notice of the receipt of any application under consideration (notice of application) to all persons to whom any real property within 1000 feet of the premises in question is assessed, and to the occupants of all single, two, three, and four family buildings (for buildings with over four families, a notice may be posted in an appropriate location within the multi-unit building), and to all of the places within 1000 feet of the premises. Such notice shall be delivered personally or by mail, addressed to the respective owners. If the tenants' name is not known, "occupant" may be used.

(b) The notice of application shall inform the recipient of the applicant's name, the applicant's proposal, and local address and the section of the Codified Ordinances under which the proposal is being processed. Such notice shall also invite the expression of comments, statements, or opinions, either in writing or person, with a time period expiring not less than 14 days from the mailing date of such notice.

(c) Subsequent to the deadline for a response to the notice of application, a decision shall be made by the Commission (taking into

consideration the comments, statements, and opinions expressed) to either approve, approve with conditions, or deny the proposal in accordance with the standard set forth in this Chapter. The Commission's decision shall be subject to review by Council, which may approve, disapprove, or modify the Commission's decision.

(d) In approving a permit for any regulated use, the Commission or Council may impose any such conditions or limitations upon the establishment, location, construction, maintenance, or operation of the regulated use as it may, in its judgment, be necessary for the protection of the public interest.

Therefore, Section 802.05 provides notice requirements which are categorized as additional prerequisites to the granting of a conditional use permit. Thus, Section 802.04 seeks to **enforce** the execution of a permit, and does not set forth fundamental or substantive provisions in keeping with the Chapter's intent and purpose. Section 802.01 provides that:

> The purpose of this Chapter is to promote the public health, safety, and welfare through the regulation of adult entertainment businesses. It is the intent of these sections to regulate entertainment businesses, as defined herein, so as to prevent crime, protect the municipality's retail trade and property values, and in general, preserve the quality of life in the municipality, while at the same time, not suppressing First Amendment rights.

As stated above, the intent and purpose behind Chapter 802 is to regulate the secondary effects of adult entertainment businesses. Petitioner sought to achieve this purpose through location requirements and the enforcement of such through the issuance of a conditional use permit. The Panel, despite acknowledging that the Petitioner designed the permit and licensing provisions as the procedure to enforce all of the substantive requirements of the ordinance, found the Chapter was designed to function solely through the issuance of or rejection of an application for a conditional use permit. The Panel erroneously jumped to the conclusion that the District Court rewrote the ordinance without evaluating the intent and purpose of the ordinance in keeping with *Brock*, supra.

It should also be noted that the invalidity of Sections 802.04 and 802.05 does not take away all avenues for the enforcement of Chapter 802. Specifically, Section 802.99 imposes a criminal penalty for violations of Chapter 802. Therefore, although the main enforcement and execution provisions of Chapter 802 have been found unconstitutional, Section 802.99 provides a secondary avenue for enforcement, allowing the substantive provisions to be given effect independently of the enforcement provisions found unconstitutional.

In conclusion, the severance of Chapter 802 is clearly permissible and does not rise to the level of rewriting an ordinance, since such severance will not fundamentally disrupt the statutory scheme of which the unconstitutional provisions are a part. *State ex rel. Maurer v. Sheward,* 71 Ohio St.3d 513, 644 N.E.2d 69 (Ohio 1994)(quoting *Geiger v. Geiger*, 117 Ohio St. 451, 160 N.E. 28 (Ohio 1927)). It was this same standard which was essentially adopted by this Court in *Immigration & Naturalization Service. v. Chadha*, 462 U.S. 919 (1983). The failure of the Court of Appeals to identify

and apply the state's law on severance and follow precedent has resulted in Chapter 802 being found unconstitutional, based upon technical grounds, and not that of the First Amendment.

CONCLUSION

The Court of Appeals' decision in this case is inconsistent with precedent set forth by this Court and the Ohio Supreme Court. The Panel's use of *Eubanks v. Wilkinson* and the prohibition on a federal court's ability to rewrite statutes was in error. If upheld, the effect will have national ramifications. State statutes on severability will be in jeopardy of becoming extinct in federal courts, and Supreme Court precedent in *Leavitt*, *Lakewood, Brock, Chadha*, and *Reese*, supra, will have no application. All state legislative enactments being challenged in federal court will run the risk of being found unconstitutional based upon the technical status of construction principles and not that of the United States Constitution. The practical effect of the Panel's decision has left Petitioner without the ability to regulate, in any way, the secondary effects of Respondent's business, despite Respondent's inability to comply with location restrictions deemed constitutional by this Court.

Therefore, based upon all of the foregoing reasons, this Petition for Writ of Certiorari should be granted. Otherwise, this Court will suffer the constructive reversals of *Leavitt*, *Lakewood, Brock, Chadha*, and *Reese*, and the confusion which will result in the courts of this land with respect to the distinction between the ability to sever statutes and the prohibition against federal courts rewriting state statutes. Further, state laws on severability, including Ohio's, will be inapplicable in federal court.

Respectfully submitted,

/s/_____
JOSEPH W. DIEMERT, JR.
Counsel of Record

DIRECTOR OF LAW,
VILLAGE OF NORTHFIELD
JOSEPH W. DIEMERT, JR. &
ASSOCIATES CO., L.P.A.
1360 S.O.M. Center Road
Cleveland, Ohio 44124
(440) 442.6800

Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed: March 4, 1999]

No. 97-4207

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Appeal from the United States District Court for the Northern District of Ohio

10280 NORTHFIELD RD., LLC, *Plaintiff-Appellant,*	)
v.	)
VILLAGE OF NORTHFIELD, *Defendant-Appellee.*	)

OPINION

BEFORE: KENNEDY and BATCHELDER, Circuit Judges; WISEMAN, District Judge.*

PER CURIAM. Plaintiff, 10280 Northfield Rd., LLC ("10280 Northfield"), brought this action against the Village of Northfield ("the Village") challenging the constitutionality and legality of a licensing and zoning ordinance for "adult entertainment" businesses. After a hearing on plaintiff's request for a permanent injunction, the District Court found that the licensing provision violated the First Amendment as an impermissible prior restraint on speech, found that provision to be severable from the rest of the ordinance, and upheld the constitutionality of the zoning provisions. Plaintiff appealed. We find the entire ordinance unconstitutional because the licensing provisions of the ordinance cannot be severed from the rest of the ordinance.

I. Background

The District Court held that the ordinance violates the First Amendment because it is a prior restraint system that fails to limit adequately the time in which the Village must make a decision on an application to operate an adult entertainment business. The District Court severed the unconstitutional portion of the licensing scheme from the rest

---

* The Honorable Thomas A. Wiseman, Jr., United States District Judge for the Middle District of Tennessee, sitting by designation.

of the ordinance and found the ordinance and remaining licensing scheme constitutional once the District Court added an "overlay." With respect to the substance of the zoning provisions, the District Court held that the ordinance does not violate the First Amendment because it is a permissible time, place, or manner restriction. The District Court also rejected the plaintiff's argument that the ordinance violates Ohio state law requiring the Village to follow required procedures in adopting such an ordinance.

The plaintiff appealed; the defendant did not. On appeal, the plaintiff first argues that the District Court improperly severed the prior restraint system, usurped the legislative function by rewriting the ordinance, and failed to rewrite the ordinance in a manner that makes it constitutional. Second, plaintiff argues that the entire ordinance is unconstitutional because it is a content-based restriction on expression that does not advance a legitimate, substantial governmental interest, is not narrowly tailored, and does not allow for reasonable alternative avenues of communication. Third, plaintiff argues that the Village did not follow state law when it enacted the ordinance.

Before the hearing on the plaintiff's request for a permanent injunction, the parties stipulated to many of the facts of the case. Therefore, most of the facts presented here are uncontested. The Village is an Ohio Chartered Municipal Corporation with a population of 3,600 and a land mass of approximately one square mile. The legislative branch of the Village is the Village Council. The Village also has a Planning Commission, which generally oversees zoning and building in the Village. *See* Northfield Code §§ 1220.01-.05.

Plaintiff, 10280 Northfield, leases the premises located at 10280 Northfield Road in the Village. Plaintiff wishes to use this location to sell sexually explicit written materials, video tapes, and movies and to offer video tapes and movies to the public for on-premises viewing.

In May of 1996, the Village adopted the ordinance at issue here, Ordinance 1996-26, which was codified as Chapter 802 of the Codified Ordinances of Northfield ("the ordinance" or "Chapter 802"). In general, the ordinance regulates the location of "adult entertainment businesses" within the Village, requires that such enterprises acquire a "Conditional Use Permit" (a "Permit") before locating or operating anywhere in the Village, and establishes guidelines and some procedures for application and review of applications for Permits. The ordinance's definitions govern the scope of the ordinance's application. The ordinance regulates "adult entertainment businesses." That term includes "adult bookstore[s],"[1] "adult motion picture theater[s],"[2] and "adult-

---

[1] Under the Village ordinance, "'[a]dult bookstore' means an establishment which utilizes twenty-five percent or more of its retail selling area for the purpose of the retail sale, rental or display (by coin or slug-operated, electronically, electrically, or mechanically controlled still or motion picture machines projectors or other image-producing devices, of books, magazines, other periodicals, films, tapes or cassettes, which are distinguished by their emphasis on adult materials." Northfield Code § 802.02(a). This is reproduced as it appears in the Northfield Code. The text is missing a closed parenthesis, which further obscures this provision.

[2] An "adult motion picture theater" is a theater with twenty-five percent or more of its viewing time showing "material

only entertainment establishment[s]."[3] Northfield Code § 802.02(b). The ordinance uses the term "adult material" to define all three types of "adult entertainment businesses." The ordinance defines "adult material" to include:

> [A]ny book, magazine.., videotape, [etc.] or other tangible thing or service, capable of arousing interest through sight, sound or touch, and:
>
> (1) Which matter is distinguished or characterized by an emphasis on matter displaying, describing or representing sexual activity, masturbation, sexual excitement, nudity, bestiality, or human bodily functions of elimination; or
> (2) Which service is distinguished or characterized by an emphasis on sexual activity, masturbation, sexual excitement, nudity, bestiality or human bodily functions of

---

distinguished or characterized by an emphasis on matter depicting, describing or relating to adult material." Northfield Code § 802.02(d).

[3] An "adult-only entertainment establishments" is "an establishment whose patrons directly or indirectly, are charged a fee and which features entertainment or services which constitute adult material, or which features exhibitions, dance routines or gyrational choreography of persons who are totally nude, topless or bottomless, or strippers or male or female impersonators, or which features similar entertainment or services which constitute adult material." Northfield Code § 802.02(e).

elimination.

Id. § 802.02(c).

Section 802.03 of the ordinance prohibits the opening of, relocation of, or conversion to an adult entertainment business without a Permit. Section 802.03 also limits where these businesses can locate. Adult entertainment businesses can locate only in the "Highway Business" or "B-2" zone, which is one of two business zones in the Village. *See id.* § 802.03(a). The ordinance also prohibits adult entertainment businesses from locating "within 500 feet of any Residential District or residential property line, church, park, preschool or school;" "within 1,000 feet of another adult entertainment business;" and "within 500 feet of any boundary of any Residential District which is within an abutting local unit of government (city, village, township)." *Id.* § 802.03. Violation of any provision of the ordinance is a fourth degree misdemeanor, punishable by a fine up to $250 and imprisonment up to 30 days for each offense. *See id.* § 802.99.

Section 802.04, captioned "Permit Guidelines," provides some additional standards governing the issuance of a Permit:

> (a) The proposed use will not be contrary to the public interest or injurious to nearby properties, and the spirit and intent of this Business Regulation and Taxation Code will be observed.
> (b) The proposed use will not enlarge or encourage the development of a skid row area.

> (c) The establishment of an additional regulated use in the area will not be contrary to any program of neighborhood conservation, nor interfere with any program of urban renewal.
> (d) All applicable provisions of this Business Regulation and Taxation Code, the Building and Housing Code and the Planning and Zoning Code will be observed.

Id. § 802.04.

Section 802.05, captioned "Notice Requirements," establishes some procedure for Permit Application and review but lacks time limits on when the Village must make decisions. *See id.* § 802.05. The section requires the Planning Commission to notify everyone residing within 1,000 feet of the property at issue of the applicant's name and proposal. The notice also invites comment to the Planning Commission within fourteen days from the mailing date of the notice. The section continues and provides that "[s]ubsequent to the deadline for response to the notice of application," the Planning Commission shall make a decision on the application. The section does not provide a time limit on the Commission's decision. The section also provides that the "Commission's decision shall be subject to review by Council, which may approve, disapprove or modify the Commission's decision;" the section also fails to provide any time limit on the Council's review. The ordinance does not mention judicial review or attempt to establish any time limits on judicial review.

Plaintiff has not applied for a "Conditional Use Permit." In March 1997, plaintiff applied to the Village for a building permit to modify the building located at 10280 Northfield Road for use as a business involving "[t]he (a) retail dissemination of books, magazines, periodicals, video tapes, movies, and accessory items, and (b) retail dissemination of video tapes/movies for on-premises viewing by patrons in video booths, and (c) retail sale of candy, cigars, cigarettes, and other dry goods items." The Village granted the building permit.

II. Discussion

This court reviews a district court's grant of a permanent injunction for an abuse of discretion, reviewing any underlying factual findings for clear error and any underlying legal conclusions de novo. *See Hodgson v. William Len Hotel Co.*, 436 F.2d 1083, 1084 (6th Cir. 1971); *see also Horenstein v. Secretary of HHS*, 35 F.3d 261, 263 (6th Cir. 1994).

We first address the licensing provisions and their severability. We note that plaintiff's facial challenge to the ordinance is permissible. "[W]hen a licensing statute allegedly vests unbridled discretion in a governmental official over whether to permit or deny expressive activity," facial challenges are permitted and "the failure to place time limitations on a decision maker is a form of unbridled discretion." *East Brooks Books, Inc. v. City of Memphis*, 48 F.3 d 220, 224 (6th Cir. 1995) (quoting *City of Lakewood v. Plain Dealer Publ'g* Co., 486 U.S. 750, 755-56 (1988) and *Freedman v. Maryland*, 380 U.S. 51, 56-57 (1965)).

The District Court held that the ordinance's licensing scheme violates the First Amendment as an impermissible prior restraint on speech, relying on *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), and *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220 (6th Cir. 1995). In *FW/PBS*, the Supreme Court found that for a prior restraint system to be permissible under the First Amendment, "the licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained, and there must be the possibility of prompt judicial review in the event that the license is erroneously denied." *FW/PBS*, 493 U.S. at 228 (plurality opinion); *see also East Brooks Books*, 48 F.3d at 224-25 (quoting and applying *FW/PBS)*. In the instant case, the District Court found that the ordinance does not require a decision in the mandatory "specified and reasonable time period" because the ordinance does not limit the time in which the Commission or the Council must make a decision on an application for a Permit and there is no provision for prompt judicial review of a decision adverse to a Permit applicant.

The defendant did not appeal from that holding and therefore the issue of whether the ordinance is an impermissible prior restraint is not before us. The plaintiff appealed from the District Court's decision and raised the only issue before us with respect to the prior restraint aspect of this ordinance: whether the District Court's reworking of the ordinance was permissible and resulted in a constitutional ordinance.

The District Court attempted to rescue the rest of the ordinance by severing the unconstitutional sections 802.04 and 802.05 in their entirety pursuant to the severability

provision of Northfield's Code, *see* Northfield Code § 202.08,[4] and by adding an "overlay" to section 802.03 which requires that "once an applicant proves that it meets the four location requirements set forth therein, a conditional use permit *shall* issue forthwith." Further, the District Court interpreted section 802.03 "as requiring a *prompt* issuance of a conditional use permit within a reasonable amount of time after the submission of a permit application which reflects compliance with the location requirements."

We must reject the District Court's attempt to salvage the ordinance because the District Court impermissibly rewrote the Village's ordinance. *See, e.g., Eubanks v. Wilkinson,* 937 F.2d 1118, 1122 (6th Cir. 1991) (holding that "Courts construe statutes to avoid constitutional difficulty when 'fairly possible'" but "the general federal rule is that courts do not rewrite statutes to create constitutionality" and "a federal court 'has very limited powers in construing state statutes or municipal ordinances'"). Moreover, the District Court's reworking of the ordinance fails to provide the required *"specified* and reasonable time period" during which the licensor must make a decision on an application for a Conditional Use Permit.

We also find that the unconstitutional aspects of the licensing provisions cannot be severed from the rest of the

---

[4] The severability section provides that "[i]f any provision of a section of the Codified Ordinances or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section or related sections which can be given effect without the invalid provision or application, and to this end the provisions are severable."

ordinance. Because "[s]everability of a local ordinance is a question of state law," *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 772 (1988), Ohio law governs whether we can sever the licensing provisions from the rest of the ordinance. The Supreme Court of Ohio has explained that "[i]n order to sever a portion of a statute, we must first find that such a severance will not fundamentally disrupt the statutory scheme of which the unconstitutional provision is a part." *State ex rel. Maurer v. Sheward,* 644 N.E.2d 369, 377 (Ohio 1994); *see also State v. Hochhausler,* 668 N.E.2d 457, 466 (Ohio 1996). In addition, Ohio uses a three part-test to assess severability:

> (1) Are the constitutional and the unconstitutional parts capable of separation so that each may be read and may stand by itself? (2) Is the unconstitutional part so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the Legislature if the clause or pan is stricken out? (3) Is the insertion of words or terms necessary in order to separate the constitutional part from the unconstitutional part, and to give effect to the former only?

Hochhausler, 668 N.E.2d at 466-67 (quoting *Geiger v. Geiger,* 160 N.E. 28, 33 (Ohio 1927)); *see also Women's Medical Prof'l Corp. v. Voinovich,* 130 F.3d 187, 202 (6th Cir. 1997), *cert. denied,* 118 S. Ct. 1347 (1998).

In the instant case, the ordinance is designed to function through the issuance of or rejection of an application for a Permit. Without the Permit and licensing procedure, we

cannot say that the ordinance still functions as designed by the Village. As enacted, the Village designed the Permit and licensing provisions as the procedure to enforce all of the substantive requirements of the ordinance. The ordinance's substantive requirements are interspersed with the Permit and licensing procedure. Therefore, severing the Permit and licensing procedures would require us to both "fundamentally disrupt the statutory scheme," in violation of the *State ex rel. Maurer v. Sheward* prohibition on such a disruption, and to violate the second part of Ohio's severability test. In addition, the District Court's attempt to rescue the ordinance by inserting words indicates that separating the unconstitutional from the constitutional provisions of the ordinance offends the third part of Ohio's severability test. For these reasons, we cannot sever the Permit and licensing provisions and thus the entire ordinance is unconstitutional.

Our holding makes it unnecessary for us to reach the plaintiffs other two arguments -- that the ordinance's zoning provisions are an unconstitutional content-based restriction on speech and that the Village failed to follow Ohio-mandated procedures in adopting this ordinance.

III. Conclusion

For the foregoing reasons, we reverse and remand the District Court for the issuance of a permanent injunction barring the enforcement of the ordinance against the plaintiff.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed: May 17, 1999]

No. 97-4207

10280 NORTHFIELD RD., LLC, an Ohio Limited Liability Company *Plaintiff-Appellant,*	)
v.	)
VILLAGE OF NORTHFIELD, an Ohio Chartered Municipal Corporation *Defendant-Appellee.*	)

ORDER

Upon consideration of the motion filed by the appellee to stay the mandate pending the filing of a Petition for Writ of Certiorari,

It is ORDERED that the motion be, and it hereby is, **GRANTED.**

The mandate is stayed for sixty days from this Order unless the Court is advised that the Petition for Writ of Certiorari has been filed.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed: September 26, 1997]

Case No. 5:97 CV 1101

10280 NORTHFIELD RD., LLC, *Plaintiff,*	)
v.	)
VILLAGE OF NORTHFIELD, *Defendant.*	)

MEMORANDUM OPINION
(Including Findings of Fact and Conclusion of Law)

I. INTRODUCTION

On April 28, 1997, plaintiff commenced this action seeking a declaration that Chapter 802 of the Village of Northfield (Ohio) Codified Ordinances is void and unenforceable. Plaintiff also sought a preliminary and permanent injunction against enforcement of Chapter 802. (Docket No. 1). The Court set the case for an expedited Case

Management Conference. Thereafter, a hearing on plaintiff's application for a preliminary injunction was conducted on June 5, 1997.

Following that hearing, the Court indicated that because of the availability of an interlocutory appeal from any ruling on the motion for preliminary injunction, it was of the view that a fully-developed record would provide a far more meaningful appeal. (Transcript of June 5, 1997 Hearing ["TRI"] at 46).[1] The Court also indicated that it would probably defer a ruling on the motion for temporary injunctive relief in favor of having a full hearing on the application for a permanent injunction. A hearing date was set.

On July 3, 1997, the Court conducted a hearing on plaintiff's application for a permanent injunction.[2] The parties jointly submitted an extensive stipulation of facts and also stipulated to the authenticity and admissibility of several exhibits. Testimony of the Village's expert David B. Hartt, has been submitted by way of deposition[3] (Docket No. 28, hereafter "Hartt TR."). Each party has also filed its post-hearing brief (Docket Nos. 32 and 33). These as well as the initial briefs have been considered.

---

[1] This transcript is Docket No. 20.

[2] Docket Nos. 30 and 31 constitute the transcript of this hearing (hereafter cited as "TR2.').

[3] David Hartt is "a city planning consultant [who is] currently president of D.B. Ham, Incorporated Planning and Development Consulting Firm." (Ham TR. at 4).

The matter being fully at issue, the Court now renders its ruling.

II. FINDINGS OF FACT

The parties have stipulated to the following facts:[4]

1. The Village of Northfield is an Ohio Chartered Municipal Corporation which has its principal offices located at 10455 Northfield Road, Northfield, Ohio 44067, and which has a population of approximately 3,600 residents and a land mass of approximately one (1) square mile.

2. The Village of Northfield has adopted ordinances captioned "Part Twelve - Planning and Zoning Code" of the Codified Ordinances of Northfield. The Northfield Zoning Code, [Part Twelve, Title Six, Chapters 1260 through 1282], divides the Village into the following [sic] 7 Zoned Districts.[5] The location of the Districts is demarcated on the Village of Northfield Zoning Map.[6]

3. The Village of Northfield has adopted ordinances captioned "Part Eight - Business Regulation and Taxation Code," [t]his Part of the Codified Ordinances being divided into the following Chapters:

---

[4] See Docket No. 26.

[5] These districts are: R-1 and R-2 (Residential), B-1 (Retail Business), B-2 (Highway Business), B-3 (Restrictive Business), C-I (Industrial), and C-2 (Light Industrial).

[6] This map is Joint Exhibit 25.

Chapter 802	Adult Entertainment Business
Chapter 804	Amusement Devices
Chapter 806	Armed Security Guards
Chapter 812	Carnivals, Circuses, and Other Fairs
Chapter 814	Commercial Parking Lots
Chapter 826	Flea Markets
Chapter 862	Oil and Gas Wells
Chapter 864	Open Air Food Markets
Chapter 868	Peddlers and Solicitors
Chapter 870	Pool Rooms, Billiard Halls, and Bowling Alleys
Chapter 878	Snow Removal Contractors

4. The Legislative branch of government of Northfield is its Village Council, created by Article IV of the Charter of the Municipality of Northfield, consisting of 6 members who are elected by the electors of Northfield and who serve a 4 year term of office.

5. Article X of the Charter of the Municipality of Northfield creates a Planning Commission consisting of 5 members, including the Mayor, 1 member of the Village Council elected annually by the Village Council, and 3 electors of the Municipality, not holding other municipal office or appointment, serving 6 year terms who are appointed by the Mayor with the confirmation of the Village Council. The powers and duties of the Planning Commission are prescribed by Article X of the Charter of the Municipality of Northfield and by "Part Twelve, Title Two" of the Codified Ordinances of Northfield and throughout other areas of the Code in which the Planning Commission is given responsibility.

6. On March 22, 1996, the Village of Northfield adopted its Ordinance No. 1996-26 which was later designated as Chapter 802 of the Codified Ordinances of Northfield.

7. Ordinance No. 1996-26 was first considered at the May 8, 1996, Regular Meeting of the Village Council, and next considered and adopted at the May 22, 1996, Regular Meeting of the Village Council.

8. Ordinance No. 1996-26, in general, undertakes to define an "adult bookstore" and/or "adult entertainment establishment," to regulate the location of such enterprises within the Village, to require that such enterprises acquire a "Conditional Use Permit" before locating or operating, and to establish guidelines and procedures regarding application for such a "Conditional Use Permit" and the granting or denial of such an application.

9. Neither the Village of Northfield Planning Commission nor the Village of Northfield Council have adopted any rules, regulations, policies, or procedures modifying or altering the Chapter 802 "Conditional Use Permit" guidelines or procedures.

10. Ordinance No. 1996-26 was not adopted in conformity with the procedures set forth in Ohio Rev. Code § 713.10 and/or Ohio Rev. Code § 713.12, in that (a) it was not, prior to its adoption, submitted to the Planning Commission for its approval, disapproval, or suggestions, and (b) it was not, prior to its adoption, submitted to the Planning

Commission for the holding of a public hearing, and (c) it was not, prior to its adoption, submitted to the Planning Commission for issuance of a report.

11. It is the position of the Village [sic] of Northfield that it was not, with respect to adoption of Ordinance 1996-26, required to comply with the O.R.C. 713.06 through 713.12 procedures because of its authority as a Chartered Municipality, and, further, because, it is contended by the Village of Northfield, Ordinance 1996-26 is a business regulation ordinance. and not a zoning, ordinance.

12. 10280 Northfield Rd., LLC, is an Ohio Limited Liability Company, which has its principal offices located at 10280 Northfield Road, Village of Northfield, Summit County, Ohio.

13. 10280 Northfield Rd., LLC, is the lessee of premises located at 10280 Northfield Road, Village of Northfield, Summit County, Ohio.

14. The premises located at 10280 Northfield Road are situated in a B-2 Zoned District.

15. Plaintiff wishes to utilize those premises to engage in a commercial operation involving the dissemination, sale, or offering to the public, at retail, sexually explicit books, magazines, periodicals, video tapes, and movies, with the video tapes/movies being available for on-premises viewing. This enterprise, if established, would be an "adult bookstore" and/or and "adult entertainment establishment" within the meaning of Chapter 802 of the Codified Ordinances of the Village of Northfield.

16. It is the position of the Village of Northfield that Plaintiff must apply for and receive a "Conditional Use Permit" prior to establishing or operating an "adult bookstore" and/or "adult entertainment establishment" if greater than 25% of its retail sales involve adult materials.

17. The premises located at 10280 Northfield Road are within 40 feet of a Residential District and residential property line. Under Section 802.03, a "Conditional Use Permit" cannot be granted for utilization of premises as an "adult bookstore" and/or "adult entertainment establishment" if, inter alia, such premises are within 500 feet of a Residential District or within 500 feet of a residential property line.

18. Plaintiff has not applied for a Chapter 802 "Conditional Use Permit."

19. On or about March 21, 1997, Plaintiff applied with the Village of Northfield for a building permit to modify the building located at 10280 Northfield Road for use as a business involving "The (a) retail dissemination of books, magazines, periodicals, video tapes, movies, and accessory items, and (b) retail dissemination of video tapes/movies for on-premises viewing by patrons in video booths, and (c) retail sale of candy, cigars, cigarettes, and other dry good items."

20. On or about April 3, 1997, Plaintiff was issued a Zoning and Building Permit in order to perform interior renovations to the premises and install a parking lot.

21. Plaintiff's enterprise, identified in Paragraph 15, would be a permitted use in the B-1 and B-2 Zoned Districts of the Village of Northfield and would not require a

Chapter 802 "Conditional Use Permit," but for Plaintiff's stated intent that more than 25% of its retail selling area will involve adult materials.

22. To Plaintiff's and Defendant's knowledge, neither Summit County nor the State of Ohio have adopted regional, county, or state plans, ordinances, or statutes which undertake to regulate the location of businesses or of "adult bookstores" or "adult entertainment establishments."

III. CONCLUSIONS OF LAW

A. Constitutional Challenge to Northfield's Ordinance (Count I)

Plaintiff's complaint alleges that Chapter 802 of the Village of Northfield Codified Ordinances is void and unenforceable because

A. It is content-based, which is to say, undertakes to suppress protected expression solely on the basis of its sexually-explicit content, with its predominate, if not exclusive, purpose being to suppress sexually-explicit speech.

B. It does not advance, and is not designed to advance, [a] legitimate, substantial Governmental interest.

C. It is not narrowly tailored to serve a significant Governmental interest.

> D. As applied, it does not allow for reasonable alternative avenues of communication instead operating to totally bans [sic] all "Adult Bookstore" enterprises from disseminating sexually-explicit speech within the Village of Northfield. . . .

(Complaint ¶ 21). Plaintiff characterizes Chapter 802 as "a prior restraint system" which

> A. Contains no time limitation within which the Planning Commission must issue a "conditional use permit" recommendation;
>
> B. Contains no time limitation within which the Village Council must make a decision granting [sic] or denying a "conditional use permit"; and,
>
> C. Contains no requirement or assurance of prompt judicial review of an adverse administrative decision.

(Complaint ¶¶ 20-21).

1. First Amendment Claim -- Time, Place and Manner Regulation

"[A] city cannot arbitrarily limit the exercise of first amendment rights. Nonobscene, erotic materials are a form of protected expression under the first amendment." Christy v. City of Ann Arbor, 824 F.2d 489 (6th Cir. 1987), cert. denied, 484 U.S. 1059 (1988) (citing Young v. American

Mini Theatres, Inc., 427 U.S. 50, 73 n.1 (1976) (Powell, concurring)). However, "[e]ven though the First Amendment protects communication [of erotic materials] from total suppression, . . . the State may legitimately use the content of these materials as the basis for placing them in a different classification from [communication of non-erotic materials]." American Mini Theatres, 477 U.S. at 70-71. Moreover, "[r]easonable regulations of the time, place, and manner of protected speech, where those regulations are necessary to further significant governmental interests, are permitted by the First Amendment." Id. at 63 n. 18 (citing cases).

In City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), the Supreme Court reviewed a constitutional challenge to a zoning ordinance which prohibited adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park or school. Because the ordinance did not ban adult theaters altogether, the Court stated that it was "properly analyzed as a form of time, place, and manner regulation." Renton, 475 U.S. at 46 (citing American Mini Theatres, Inc., supra). Although regulations designed to restrain speech on the basis of its content are presumptively in violation of the First Amendment, See, Carey v. Brown, 447 U.S. 455,462-463, and n. 7 (1980); Police Dept. of City of Chicago v. Mosley, 408 U.S. 92, 95 (1972), "so-called 'content-neutral' time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." Renton, 475 U.S. at 47.

In Ward v. Rock Against Racism, 491 U.S. 781, reh'g denied, 492 U.S. 937 (1989), the Court "clarif[ied] the legal standard applicable to governmental regulation of the time, place, or manner of protected speech." Id. at 789. The Ward Court stated that

> the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."

Id. at 791 (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

> The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not

> others. Government regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech.

Ward, 491 U.S. at 791 (internal citations and quotation marks omitted).

Chapter 802 was, by its terms, "justified without reference to the content of the regulated speech[.]" Ward, 491 U.S. at 791. Section 802.01 of the Northfield Codified Ordinances states:

> The purpose of this chapter is to promote the public health, safety and welfare through the regulation of adult entertainment businesses. It is the intent of this chapter to regulate adult entertainment businesses, as defined in Section 802.02(b), so as to prevent crime, protect the Municipality's retail trade and property values and, in general, preserve the quality of life in the Municipality, while at the same time not suppressing First Amendment rights.[7]

---

[7] Plaintiff argues that Councilman King, who introduced the ordinance, testified that citizens disliked the content of materials disseminated by adult businesses and did not want such businesses anywhere in Northfield based upon that content. TR2 at 114-116, 126-129. However, "[i]t is a familiar principle of constitutional law that [a court] will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive . . . What motivates one legislator to make a speech about a statute is not necessarily what motivates . . . others to enact it[.]" Renton, 475

In Bamon Corp. v. City of Dayton, 923 F.2d 470 (6th Cir. 1991), an adult entertainment facility challenged a municipal ordinance that prohibited doors on video viewing booths in adult entertainment arcades. The Court of Appeals concluded that it was a content-neutral ordinance because it was "aimed at eliminating the *secondary effects* produced by totally enclosed video viewing booths and is not attempting to regulate what is shown in those booths." Id. at 473 (emphasis in original).

Similar to the ordinance in Bamon, Northfield's Section 802.01 is aimed at the secondary effects of adult entertainment establishments, namely: crime, diminution of the municipality's retail trade and property values, and deterioration of the quality of life in the Municipality. There is no reference in the section to any intent to regulate the content of speech; quite the contrary, the section specifically states that it is not intended to suppress First Amendment fights. The ordinance is intended to "serve[ ] purposes unrelated to the content of expression," Ward, 491 U.S. at 791, and is, therefore, properly analyzed as a content-neutral ordinance.

The Court's inquiry now turns to whether the Village of Northfield was pursuing a significant government interest in enacting the ordinance. Although, as plaintiff argues, Northfield did not conduct any of its own studies in order to conclude that adult entertainment businesses had the potential to damage the community, this is not required under the case

---

U.S. at 48 (quoting United States v. O'Brien, 391 U.S. 367, 383-384 (1968)).

law. In Renton, a case involving an ordinance similar to the one at issue here, the Supreme Court did not require that city of approximately 32,000 people to commission its own studies. Renton was allowed "to rely on the experiences of Seattle and other cities.., in enacting its adult theater zoning ordinance." Renton, 475 U.S. at 51.

Northfield Village Councilman Michael King, who was largely responsible for spearheading the effort to pass the Northfield ordinance, testified that prior to proposing the ordinance he had "some discussions with leaders from Painesville Township who have adult businesses within their jurisdiction." (TR2 at 102). He testified that he had "toured Brookpark and [had] seen first hand what has happened to their community in the area dealing with adult entertainment." Id. He testified that he "talked to different law officials asking them for their comments dealing with adult businesses." Id. He studied ordinances from other communities, specifically, Mayfield, Ohio. Id. at 103. The Northfield law department assisted him by drafting a proposed ordinance in light of Supreme Court precedent. Id. at 104.

For a village the size of Northfield, it would not be reasonable to expect it to engage in separately commissioned studies or research beyond consulting with other communities that have experience with adult entertainment establishments. As in Renton, Northfield is allowed to rely on the experience and studies of other communities. In fact, the Northfield ordinance is very similar to the ordinance upheld in Renton which the Supreme Court concluded was "by its terms . . . designed to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods,

commercial districts, and the quality of urban life,' not to suppress the expression of unpopular views." Renton, 475 U.S. at 48.

Although the Sixth Circuit has required "some proof that the city was actually attempting to address the problem of urban blight," Christy v. City of Ann Arbor, 824 F.2d 489, 491 (6th Cir. 1987), cert. denied, 484 U.S. 1059 (1988) (citing (CLR Corp. v. Henline, 702 F.2d 637 (6th Cir. 1983)), it has also acknowledged that all that is necessary is "evidence in City Council meetings *or elsewhere,*" Id. (emphasis added), that the ordinance was enacted for legitimate reasons unrelated to the content of the regulated speech.[8] As noted by DLS, Inc. v. City of Chattanooga, 107 F.3d 403 (6th Cir. 1997), this argument may be foreclosed by Justice Souter's concurrence in Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991), where he stated:

> Our appropriate focus is not an empirical enquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest in the service of

---

[8] The case of Keego Harbor Co. v. City of Keego Harbor, 657 F.2d 94 (6th Cir. 1981) offers no support for the plaintiff's position. There a constitutional challenge was brought against an ordinance which effectively banned adult movie theatres in the town. The ordinance was struck down by the Sixth Circuit in part because the city only belatedly, that is, at trial, tried to come up with reasons for enacting the ordinance. There was no evidence that any of those reasons were on the minds of the legislators when the ordinance was enacted. They appeared to have been created as a post hoc attempt to justify the ordinance at trial.

> which the challenged application of the statute may be constitutional. . . . [L]egislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects.

107 F.3d at 411 (quoting Barnes, 501 U.S. at 582-584)).

Here, the Northfield ordinance itself explicitly contains valid reasons for its enactment. reasons which are supported by the testimony of Councilman King[9]

---

[9] Northfield's expert, David Hartt, also testified that in his 30 years of experience in the area of city planning (Hartt TR at 5-6) that adult entertainment businesses are recognized as having secondary, adverse impacts on adjacent properties, namely, that these types of businesses diminish property values, cause a skid-row effect, bring in more nighttime activities than do other businesses, and repel the establishment of other businesses in the area. (Hart TR at 11-13). Although this testimony was objected by counsel for the plaintiff, the Court overrules that objection and admits Mr. Hartt's testimony on this matter.

The plaintiff's expert, Robert Bruce McLaughlin, a land use and local government consultant (TR2 at 5-6), essentially disagreed with this opinion, insisting that there is no empirical data but only popular perception to support the view that adult entertainment establishments have adverse secondary impact on a neighborhood. (TR2 at 72-75). Mr. McLaughlin went so far as stating that Supreme Court decisions, particularly American Mini Theaters, which acknowledged the opposite view are largely based on "inadmissible opinion" testimony. (TR2 at 75).

Having determined that the Village of Northfield has articulated a significant government interest, the next inquiry is whether the ordinance is narrowly tailored to meet that interest.

As a threshold matter, the Court notes that the Northfield ordinance does not outlaw adult entertainment altogether. In fact, if a business devotes less than 25% of its retail sales to adult materials, it is permitted to operate without any permission or interference, provided it is located in a district zoned for business.

The distance requirements contained in Northfield's ordinance are less stringent than those held valid in Renton and are similar to those held valid in American Mini Theaters. In fact, Northfield's expert, David Hartt, testified that the distance requirements in Northfield's ordinance are less restrictive than those contained in most adult entertainment ordinances. (Hartt TR at 27-28). By requiring a certain limited distance between adult entertainment businesses and residential areas, churches, schools, parks, and other adult entertainment businesses, Northfield's ordinance is narrowly tailored to ensure that the secondary effects are minimized.

Finally, the Court must examine whether the Northfield ordinance leaves open reasonable alternative avenues to operate adult entertainment businesses.

In Renton, the Court of Appeals had concluded that because some of the available land was already occupied by existing businesses and practically none of the undeveloped land was available for sale or lease, virtually little land was truly "available" thus resulting in "a substantial restriction on

speech."[10] 748 F.2d at 534.[11] The Supreme Court rejected this view stating:

> That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. And although we have cautioned against the enactment of zoning regulations that have "the effect of suppressing, or greatly restricting access to, lawful speech," American Mini Theatres, 427 U.S., at 71, n. 35, 96 S.Ct., at 2453, n. 35 (plurality opinion), we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses

---

[10] The Court of Appeals reached this conclusion in reliance on a statement from American Mini Theaters, 427 U.S. at 71 n.35, that "[t]he situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech." 748 F.2d at 534 n. 11.

[11] In Renton, of the 520 acres of land in the city where adult theater sites would be permitted, a substantial portion was occupied by:

(1) a sewage disposal site and treatment plant;
(2) a horseracing track and environs;
(3) a business park containing buildings suitable only for industrial use;
(4) a warehouse and manufacturing facilities;
(5) a Mobil Oil tank farm; and
(6) a fully-developed shopping center.

748 F.2d at 534.

> for that matter, will be able to obtain sites at bargain prices. See id., at 78, 96 S.Ct., at 2456 (Powell, J., concurring) ("The inquiry for First Amendment purposes is not concerned with economic impact"). In our view, the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city, and the ordinance before us easily meets this requirement.

Renton, 475 U.S. at 54.

David Hartt identified a site which meets all the restrictions of the ordinance and would constitute a suitable location for an adult entertainment business. This is an area of vacant land measuring approximately 150 square feet, set back off of State Route 8 by about 50 yards, but available via an access drive and a large shopping center parking lot to its north. It is part of a larger parcel of land which once housed a drive-in movie theater but is now abandoned. (Hartt TR at 39-44,121-122; TR2 at 25, 36-41; Joint Exhibits 33-A, 25-B).[12] Plaintiff's expert attempted to discount the availability of this site because it is vacant land without a building presently connected to utilities and with "too many physical

---

[12] The area colored in yellow on Joint Exhibit 33-A shows the present location of the plaintiff. The red-hatched areas show the eligible location. Similar locations are shown in solid black and black hatching, respectively, on Joint Exhibit 25-B, a copy of which is attached to this Memorandum Opinion.

and legal impediments to its development.[13] (TR2 at 29). However, these are development problems that are not uncommon.[14] Further, since Northfield comprises a very small geographic area with a narrow commercial corridor directly abutting residential neighborhoods, a limited conforming area can be expected and is, in fact, reasonable. (Hartt TR at 45-47).[15]

---

[13] Mr. McLaughlin did not consider the red-hatched area of Joint Exhibit 33-A as a suitable parcel. Among the problems raised by Mr. McLaughlin with respect to this site was the need to obtain a leasehold arrangement, an access easement over the shopping center property to the north, extension of water, sewer and power lines as well as telephone service. (TR2 at 24-25). He also noted that, because the land had at one time been the site of a drive-in theater, there was the problem of "soil compaction" and "a potential for hazardous waste drippings" which a business owner would have to overcome. (TR2 at 28-29).

[14] For instance, Mr. McLaughlin acknowledged that both the shopping center adjacent to this piece of land and Northfield Park Race Track are set back farther from Route 8 than the red-hatched parcel and both are served by utilities. TR2 at 36-42.

[15] Since Renton, courts which have dealt with whether particular ordinances "effectively preclude" the operation of adult businesses or leave only a small number of potential sites available for such businesses have generally ignored complaints that available sites are not commercially viable. See, e.g., Woodall v. City of El Paso, 49 F.3d 1120, reh'g denied, 59 F.3d 1244 (5th Cir. 1995) (neither commercial viability nor present availability are relevant considerations); D.G. Restaurant Corp. v. City of Myrtle Beach, 953 F.2d 140 (4th Cir. 1991) (ordinance was not invalid because it relegated adult businesses to a few poorly lit, commercially

The Court concludes that Chapter 802 of Northfield's Codified Ordinances is a content-neutral ordinance which is narrowly tailored to advance a legitimate governmental interest, and which does allow for reasonable alternative avenues of communication.

2. First Amendment Claim -- Prior Restraint System

Plaintiff also challenges the permit scheme contained in Northfield's ordinance. Complaint ¶¶ 20-21. It argues that the scheme, which requires obtaining a conditional use permit, is an unconstitutional prior restraint because it does not contain the requisite procedural safeguards, particularly time restraints and an opportunity for prompt judicial review.

---

undesirable sites in industrial areas far from tourist-oriented businesses); Rothschild v. Richland County Bd. of Adjustment, 420 S.E.2d 853 (S.C. 1992) ("commercial viability" is irrelevant to consideration of whether alternative avenues exist for sexually oriented businesses to operate); City of National City v. Wiener, 838 P.2d 223 (Cal. 1992), cert. denied, 510 U.S. 824 (1993) (where adult businesses were permitted in shopping malls, it was irrelevant that malls would never actually rent space to such businesses). A different situation might exist if adult businesses are allowed only on sites that are completely inaccessible or physically unsuitable (e.g., under water or occupied by an airport). See, e.g., Topanga Press, Inc. v. City of Los Angeles, 989 F.2d 1524 (9th Cir. 1993), cert. denied, 511 U.S. 1030 (1994) (site is not available for constitutional purposes "when it is unreasonable to believe that it would ever become available to any commercial enterprise").

"Although facial challenges to legislation are generally disfavored, they have been permitted in the First Amendment context where the licensing scheme vests unbridled discretion in the decisionmaker and where the regulation is challenged as overbroad." FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 223 (1990). Failure to place time limitations on the decisionmaking process "is a species of unbridled discretion." Id. (citing Freedman v. Maryland, 380 U.S. 51, 56-57 (1965)). In such circumstances, "one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license." City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 755 (1988).

It is undisputed that the plaintiff has not applied for a conditional use permit. See Stip. No. 18, supra. Nonetheless, under the above-cited case law, the Court will permit plaintiff's facial attack.[16]

---

[16] Although the Court has permitted plaintiff a facial challenge to the ordinance, an argument could be made that he lacks standing because his injury has so far been caused only by the fact that he is too close to a residence (a portion of the ordinance which this Court has found valid and enforceable) not because of any flaw in the permit scheme contained in Sections 802.04 and 802.05. See, e.g., Basiardanes v. City of Galveston, 682 F.2d 1203, 1218 (5th Cir. 1982) (plaintiff was found to have standing to challenge only the dispersal provisions of an ordinance, not its permit scheme because "[t]he permit system played no role in causing [any] injuries [to the plaintiff]". Under this theory, it might also be concluded here that plaintiff does not have standing to challenge the permit scheme. However, for purposes of a complete discussion of the substantive issues in this case, the Court has not applied this lack of standing theory.

A government engages in prior restraint of speech when it requires persons to obtain permission before disseminating protected speech expression, thereby giving governmental officials "the power to deny the use of a forum in advance of actual expression." Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975). Although "[p]rior restraints are not unconstitutional per se . . . [a]ny system of prior restraint . . ., comes to [the] Court bearing a heavy presumption against its constitutional validity." Id. at 558.

For a prior restraint system to survive a constitutional challenge, certain procedural safeguards are required:

> the licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained, and there must be the possibility of prompt judicial review in the event that the license is erroneously denied.

FW/PBS, Inc., 493 U.S. at 228.

Section 802.03 of the Northfield ordinance, which sets forth the location requirements already discussed above, prohibits opening an adult entertainment business unless the location requirements are met and "unless authorized by the issuance of an adult entertainment conditional use permit in accordance with Section 802.04." Section 802.04 states:

Permit Guidelines.

> An adult entertainment establishment shall be issued a conditional use permit if the establishment of the business is in accordance with Section 802.03 and the following:
>
> (a) The proposed use will not be contrary to the public interest or injurious to nearby properties, and the spirit and intent of this Business Regulation and Taxation Code will be observed.
>
> (b) The proposed use will not enlarge or encourage the development of a skid row area.
>
> (c) The establishment of an additional regulated use in the area will not be contrary to any program of neighborhood conservation, nor interfere with any program of urban renewal.
>
> (d) All applicable provisions of this Business Regulation and Taxation Code, the Building and Housing Code and the Planning and Zoning Code will be observed.

Section 802.05 sets forth certain requirements for notice "[p]rior to granting a conditional use permit." The notice must invite public comments "within a time period expiring not less than fourteen days from the mailing date of such notice." Section 802.05 further provides:

> (c) Subsequent to the deadline for response to the notice of application, a decision shall be made by the [Planning] Commission (taking into consideration the comments, statements and opinions expressed) to either approve, approve with conditions or deny the proposal in accordance with the standards set forth in this chapter. The Commission's decision shall be subject to review by Council, which may approve, disapprove or modify the Commission's decision.
>
> (d) In approving a permit for any regulated use, the [Planning] Commission or Council may impose any such conditions or limitations upon the establishment, location, construction, maintenance or operation of the regulated use as may, in its judgment, be necessary for the protection of the public interest.

Applying the case law to the Northfield ordinance, the Court concludes that the ordinance lacks the requisite procedural safeguards. There are virtually no time limits in the ordinance, except for the requirement that public comments be submitted within 14 days of receipt of the notice that an application has been made. There are no time restrictions placed on the Planning Commission with respect to when the notice must be issued. Since Section 802.05(a) merely provides that notice must be issued "[p]rior to granting a conditional use permit," there is nothing to prevent the Planning Commission from putting the application on a "back burner" thus forcing the applicant to wait indefinitely for the issuance of the notice of application. Once notice has been

given and comments received, there is no specific time frame within which the Planning Commission must make its recommendation to the Village Council as to whether the application should be granted, granted with conditions, or denied.[17] In addition, there is no time limit for action by the Village Council once the Planning Commission has made its recommendation. Lastly, there is no provision for prompt judicial review of an adverse decision.

---

[17] The Court also notes that, in making its recommendation to the Council, the Planning Commission has virtually unfettered discretion in applying the highly subjective criteria set forth in Section 802.04 and quoted above. Although these four guidelines are found virtually verbatim in other cases, their presence in the instant ordinance is quite different from in those other cases. For example, in Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), the challenged (but upheld) ordinance authorized the Zoning Commission to waive a 1,000-foot distance restriction if it found that the proposed adult use would not be contrary to public interest or injurious to nearby properties, would not enlarge a skid row area, would not be contrary to any neighborhood conservation or renewal project, and otherwise met all applicable regulations. In the instant case, these four guidelines must be met in addition to the locational requirements. The four guidelines are not used as a means of waiving the locational restrictions but rather as a way of making those restrictions even more draconian. While as a waiver provision these four guidelines might not be considered too vague and/or subjective, as additional requirement for obtaining a permit they are. There is no way for an applicant to anticipate or predict the Commission's judgment with respect to these four guidelines. There is no way to know whether an application has any chance at all of being granted or whether it is purely a "lost cause" from the start.

Accordingly, the Court concludes that the failure of Sections 802.04 and 802.05 of the Northfield ordinance to provide essential procedural safeguards renders the conditional use permit scheme set forth therein unconstitutional insofar as it is enforced against plaintiff's proposed First Amendment activity.

Although this Court's ruling invalidates Sections 802.04 and 802.05, it does not change the fact that requiring a conditional use permit, in and of itself, is not an unconstitutional restriction on First Amendment rights. See discussion on time, place and manner, supra. Section 802.03 of the Northfield ordinance remains viable, with the overlay that, once an applicant proves that it meets the four location requirements set forth therein, a conditional use permit shall issue forthwith.[18] Although there is no time limit expressly stated in Section 802.03, since the four location requirements are objective and easily measurable criteria, this Court reads that Section (as now modified to delete any reference to the permit guidelines in Section 802.04) as requiring a prompt issuance of a conditional use permit within a reasonable amount of time after the submission of a permit application which reflects compliance with the location requirements. It goes without saying that it cannot take long for the Planning Commission to determine whether a proposed site for an adult entertainment business meets the location requirements, a determination which requires little more than a tape measure.

---

[18] Invalidation of Sections 802.04 and 802.05 does not require invalidation of the entire chapter because of severability provisions contained in Northfield's Codified Ordinances. See Section 202.08 (Severability).

3. Summary Conclusion on First Amendment Claim (Count I)

As discussed in detail above, the Court concludes that the Village of Northfield Codified Ordinances, Sections 802.01,802.02, 802.03 (this latter as modified by the discussion above), and 802.99 withstand constitutional scrutiny under the First Amendment.

The Court further concludes that Sections 802.04 and 802.05 are unconstitutional prior restraints on First Amendment rights of free speech because they do not contain the procedural safeguards required by FW/PBS, Inc. v. City of Dallas, supra.

As a consequence of this ruling, the defendant Village of Northfield is permanently enjoined from enforcing Section 802.04 and 802.05, as now written, against the plaintiff, 10280 Northfield Rd., LLC. To that extent, plaintiff's motion for a permanent injunction is granted.

Also as a consequence of this ruling, plaintiff's motion for a permanent injunction with respect to Sections 802.01,802.02, 802.03 (as modified by the discussion herein), and 802.99 is denied.

To be perfectly clear: the practical effect of this ruling is that plaintiff is not entitled to a conditional use permit under the ordinance, even as modified by this Memorandum Opinion. Plaintiff, 10280 Northfield Rd., LLC, presently leases property, where it wishes to locate an adult entertainment business, which is located 40 feet from a residential property line and, therefore, fails to meet the

constitutionally permissible location restrictions in Section 802.03(b). Further, an additional practical effect of this Memorandum Opinion is that, in the event plaintiff were to obtain the property herein identified as a suitable location (within the meaning of Section 802.03) for an adult entertainment business, the Village of Northfield is enjoined from applying Sections 802.04 and 802.05 of the Codified Ordinances, as written, to that property.

B. Challenge to Conformity with Ohio Revised Code Chapter 713 (Count II)

In Count II of the Complaint, plaintiff seeks an order declaring Northfield's ordinance void and unenforceable for failure to comply with the provisions of Ohio Revised Code Chapter 713. There is no dispute that Northfield passed the ordinance without complying with Chapter 713. See Stip. No. 10. However, Northfield takes the position that, as a Chartered Municipality, it is not required to comply with the procedures in Chapter 713 and that, in any event, the ordinance is a business regulation not a zoning ordinance and, as such, is not subject to Chapter 713.

As a threshold matter, the Court concludes that the ordinance is clearly a zoning ordinance, notwithstanding its location in the business regulation section of the Code of Ordinances. This ordinance regulates land use, not the operations of a business. The issue which is dispositive of this count of the complaint is whether Northfield was required to follow the Ohio Revised Code in enacting Chapter 802.

Municipal powers originate in both the Ohio Constitution and the Ohio Revised Code. Under Article XVIII, § 7 of the Ohio Constitution "[a]ny municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government." Article XVIII, § 3 provides that "[m]unicipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general law."

The Village of Northfield is a home-rule municipality. The Preamble to the Charter of the municipality states:

> We, the people of the Village of Northfield, in the County of Summit, State of Ohio, in order to secure for ourselves the benefit of municipal home rule and to exercise all the powers of local self-government under the Constitution and the laws of the State of Ohio, do hereby frame and adopt this Charter for the government of the Village of Northfield.

The plaintiff cites Bardo v. City of Lyndhurst, 37 Ohio St.3d 106, 524 N.E.2d 447 (1987), for the proposition that a specific charter provision setting forth procedures for adopting zoning ordinances is required before state statutory provisions are overridden. Plaintiff argues that no such specific charter provision can be found in Northfield's Charter. However, the more recent case of Bednar v. North Canton, 69 Ohio St.3d 278, 631 N.E.2d 621 (1994), limited Bardo. In Bednar, the Supreme Court of Ohio found that a

municipal charter may, in general terms, "reserve to [its] legislative authority any residual home rule powers not exercised directly in the charter." Id. at 280-281.[19]

The Preamble to Northfield's Charter, quoted above, together with Charter Section 4.01 which vests in the Village Council "[a]ll legislative power of the Municipality under this Charter, together with all such powers conferred upon municipalities by the Constitution and law of Ohio," is a sufficient general reservation. Therefore, the Court concludes that Northfield need not comply with Chapter 713 when enacting zoning regulations.

What this Court finds, however, to be more dispositive on Count II is a matter not taken into account by either party, namely, that in passing this ordinance, the Council expressly identified it as an "emergency ordinance." See Joint Exhibits 26 (p. 4) and 28. Emergency matters, even zoning matters, are not governed by Chapter 713. Therefore, this Court concludes that Ohio Revised Code Chapter 713 does not apply under the facts of this case. Accordingly, plaintiff's challenge in Count II, brought only under Ohio Revised Code Chapter 713, does not survive.[20]

---

[19] Bednar limited Bardo's specificity requirement to cases where a charter delegates authority to municipal civil service commissions. See, Murphy v. Village of Powell, Nos. 95-CA-E-12-093, 95-CA-E-12-095, 1996 WL 488017, at *2 (Ohio App., 5 Dist. July 29, 1996).

[20] The Court notes that Section 4.11 of Northfield's Charter provides that emergency ordinances require a statement of the necessity for such action and the affirmative vote of two-thirds

IV. CONCLUSION

For the reasons set forth above, plaintiff's application for permanent injunction is granted in part and denied in part.

With respect to Count I of the Complaint, the Court concludes that Sections 802.01, 802.02, 802.03 (as modified by discussion herein) and 802.99 of the Codified Ordinances of the Village of Northfield withstand scrutiny under the First Amendment free speech provisions, requiring a denial of injunctive relief with respect to these provisions.

Further, the Court concludes that Sections 802.04 and 802.05, as written, do not withstand First Amendment scrutiny. The Village of Northfield is hereby permanently enjoined from enforcing these two sections, as presently written, against the plaintiff.

With respect to Count II of the Complaint, the Court concludes that Ohio Revised Code Chapter 713 is inapplicable to the ordinance at issue. To that extent, injunctive relief is not available to the plaintiff.

---

of the Council members. Exhibits before this Court show that these two requirements were met. See Joint Exhibit 28 and Joint Exhibit 27, pp. 3-4. In addition, "[a]ny zoning or rezoning of lands within the Municipality" which was enacted by way of an emergency ordinance "must be put on the ballot for a majority vote of the people at either the next regular general or primary election." Section 4.11. No evidence has been presented with respect to this provision.

To repeat what was stated above, the practical effect of this ruling is that plaintiff is not entitled to a conditional use permit under the ordinance, even as modified by this Memorandum Opinion. Plaintiff, 10280 Northfield Rd., LLC, presently leases property, where it wishes to locate an adult entertainment business, which is located 40 feet from a residential property, line and, therefore, fails to meet the constitutionally permissible location restrictions in Section 802.03(b). Further, an additional practical effect of this Memorandum Opinion is that, in the event plaintiff were to obtain the property herein identified as a suitable location (within the meaning of Section 802.03) for an adult entertainment business, the Village of Northfield is enjoined from applying Sections 802.04 :and 802.05 of the Codified Ordinances, as written, to that property.

This is a final appealable order.

IT IS SO ORDERED.

/s/_____
David D. Dowd, Jr.
U.S. District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed: May 5, 1999]

No. 97-4207

10280 NORTHFIELD RD., LLC,
Plaintiff-Appellant,

v.

VILLAGE OF NORTHFIELD,
Defendant-Appellee.

ORDER

BEFORE: KENNEDY and BATCHELDER, Circuit Judges; and WISEMAN,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote

* Hon. Thomas A. Wiseman, Jr., Senior United States District Judge for the Middle District of Tennessee, sitting by designation.

on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk